SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 2257 (Wilson)
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AM

SUBJECT

Local government: property-related water and sewer fees and assessments: remedies

DIGEST

This bill provides that if a local agency complies with specified exhaustion of remedies procedures for purposes of any fee of assessment adopted by that local agency pursuant to Section 4 or 6 of Article XIII D of the California Constitution (Proposition 218) then a person or entity that has not timely submitted to that local agency a written objection, as specified, is prohibited from bringing a judicial action or proceeding alleging noncompliance with those constitutional provisions. The bill specifies that a court's review of any challenge of a fee or assessment for failure to comply with the procedural and substantive requirements of Proposition 218 is to be limited to a record of proceedings containing specified documents, except specified.

EXECUTIVE SUMMARY

The courts have held that a party is generally required to exhaust administrative remedies before pursuing an action in the courts, either explicitly by statute or as inferred by the courts. Neither Proposition 218 nor its implementing statutes contain an express requirement to exhaust administrative remedies, and the California Supreme Court has declined to infer an exhaustion requirement in two recent cases. This bill seeks to address this issue by enacting an exhaustion of remedies procedure that a person or entity would have to comply with in order to bring a judicial action under Proposition 218, if a local agency elects to use it, otherwise they would be prohibited from challenging that fee or assessment. The bill also limits the administrative record to certain documents for purposes of judicial review. The author has agreed to take several amendments, which are contained in a mock-up at the end of the analysis. The bill is sponsored by the Association of California Water Agencies and supported by numerous water districts. The bill is opposed by various business associations and taxpayer advocacy groups, including the Howard Jarvis Taxpayers Association and the California Business Roundtable. Should this bill pass this Committee, it will next be heard in the Senate Local Government Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Established, through Proposition 218, voter approval requirements for general and special taxes and granted the initiative power to voters to reduce or repeal any local tax, assessment, fee, or charge. (Cal. Const. Art. XIII C)

2) Established, through Proposition 218, a category of property related fees and charges that can only be enacted if certain procedural requirements are met. (Cal. Const. Art. XIII D.)
    a) Requires a local agency to provide written notice by mail of any proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each parcel, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, and the date, time, and location of a public hearing on the proposed fee or charge.
    b) Requires a public hearing to be conducted on the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition.
        i. At the public hearing, the agency is required to consider all protests against the proposed fee or charge.
        ii. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency is prohibited from imposing the fee or charge. (Cal. Const. art XIIID Section 6(a).)

3) Prohibits a fee or charge from being extended, imposed, or increased by any agency unless it meets all of the following requirements:
    a) revenues derived from the fee or charge do not exceed the funds required to provide the property related service;
    b) revenues derived from the fee or charge are not to be used for any purpose other than that for which the fee or charge was imposed;
    c) the amount of a fee or charge imposed upon any parcel or person as an incident of property ownership does not exceed the proportional cost of the service attributable to the parcel;
    d) no fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question and that fees or charges based on potential or future use of a service are not permitted; and
    e) no fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services,

where the service is available to the public at large in substantially the same manner as it is to property owners. (Cal. Const. art. XIID Section 6 (b).)

4) Enacts implementing statutes for the notice requirement under 2), above, including that an agency must provide a minimum of 45 days' notice of an increase to a fee or charge, as specified.(Gov. Code § 53755.)
    a) Authorizes the notice required to be included in the agency's regular billing statement for the fee or charge or by any other mailing by the agency to the address to which the agency customarily mails the billing statement for the fee or charge, but if an agency desires to preserve any authority it may have to record or enforce a lien on the parcel to which service is provided, the agency is required to also mail notice to the record owner's address shown on the last equalized assessment roll if that address is different than the billing or service address. (*Id*. at (a).)

5) Requires any judicial action or proceeding to attack, review, set aside, void, validate, or annul an ordinance, resolution, or motion adopting a fee or charge for water or sewer service, or modifying or amending an existing fee or charge for water or sewer service, to be commenced within 120 days of the effective date or of the date of the final passage, adoption, or approval of the ordinance, resolution, or motion, whichever is later. (Gov. Code § 53759.)
    a) This provisions applies only to a fee or charge for water or service that has been adopted, modified, or amended after January 1, 2022. (*Id*. at (f).)

This bill:

1) Provides that for the purposes of any fee or assessment adopted by a local agency pursuant to Section 4 or 6 of Article XIII D of the California Constitution, if the local agency complies with the exhaustion of remedies procedures described in 2), below, a person or entity is prohibited from bringing a judicial action or proceeding alleging noncompliance with Article XIII D of the California Constitution, for any new, increased, or extended fee or assessment, unless that person or entity has timely submitted to the local agency a written objection to that fee or assessment that specifies the ground for alleging noncompliance.

2) Specifies that for the prohibition in 1), above, to apply a local agency must meet all of the below specified provisions.
    a) Makes available to the public a proposed fee or assessment no less than 45 days prior to the deadline for a ratepayer to submit an objection.
    b) Posts on its internet website a written basis for the fee or assessment.
    c) Mails the written basis to a property owner upon request.

d) Provides at least 45 days for a property owner to review the proposed fee or assessment and to timely submit to the local agency a written objection to that fee or assessment that specifies the grounds for alleging noncompliance.
    i. In order to be considered timely, any written objection must be submitted by a deadline established by the local agency, which shall be no less than 45 days after notice is provided pursuant to subdivision (c) of Section 4 or paragraph (1) of subdivision (a) of Section 6 of Article XIII D of the California Constitution, as applicable.
e) Considers and responds in writing, including the grounds for which a challenge is not resulting in amendments to the proposed fee or assessment, to any timely submitted written objections prior to the close of the protest hearing or ballot tabulation hearing required under Section 4 or 6 of Article XIII D of the California Constitution.
    i. The agency's response must explain the substantive basis for retaining or altering the proposed fee or assessment in response to the written objection.
    ii. Timely submitted written objections and agency responses required by this subdivision are to be presented to the local agency's governing body for consideration prior to or during a protest hearing or ballot tabulation hearing required under Section 4 or 6 of Article XIII D of the California Constitution.
f) Includes in the written notice, sent pursuant to paragraph (c) of Section 4 or paragraph (1) of subdivision (a) of Section 6 of Article XIII D of the California Constitution, a statement that contains the following information:
    i. That all written objections must be submitted within the written objection period set by the local agency and that a failure to timely object in writing bars any right to challenge that fee or assessment through a legal proceeding.
    ii. All substantive and procedural requirements for submitting an objection to the proposed fee or assessment.
g) Completes the procedures described in paragraphs (a) to (f), above, prior to the completion of the required protest hearing and ballot tabulating hearing.

3) Requires a local agency's governing body, in exercising its legislative discretion, to determine whether the written objections and the agency's response warrant clarifications to the proposed fee or assessment, a reduction in the proposed fee or assessment, further review before making a determination on whether clarification or reduction is needed, or whether to proceed with a protest hearing or ballot tabulation hearing.

4) Requires a local agency's response to timely submitted written objections to go to the weight of the evidence supporting the agency's compliance with the substantive limitations on fees and assessments imposed by Section 4 or 6 of Article XIII D of the

California Constitution. There shall be no independent cause of action as to the adequacy of a local agency's response.

a) Specifies that this provision only applies to a fee or charge for water or sewer service that has been adopted, modified, or amended after January 1, 2022.

5) Defines the following terms for purposes of the above provisions:
   a) "Exhaustion of remedies requirement" means the written objection requirement under 1), above.
   b) "Fee or assessment" means the amount of any property-related water or sewer fee or charge, or any special assessment levied or the methodology used to develop any levy fee, charge, or assessment.
   c) "Sewer" includes systems, all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes, including lateral and connecting sewers, interceptors, trunk and outfall lines, sanitary sewage treatment or disposal plants or works, drains, conduits, outlets for surface or storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters. "Sewer system" shall not include a sewer system that merely collects sewage on the property of a single owner.
   d) "Water" means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source.

6) Provides that, if a local agency adopts a fee or assessment and complies with the exhaustion of remedies procedures described above, any judicial action or proceeding to review, invalidate, challenge, set aside, rescind, void, or annul the fee or assessment for failure to comply with the procedural and substantive requirements of Section 4 or 6 of Article XIII D of the California Constitution in the fee or assessment setting process is limited to the record of proceedings before the local agency for that fee or assessment as follows:
   a) Any cost-of-service or rate study or report, any engineer's report, agency staff reports, and related documents prepared by the local agency with respect to the fee or assessment.
   b) Any transcript or minutes of the proceedings at which the decisionmaking body of the local agency heard testimony or public comment on the fee or assessment, and any transcript or minutes of the proceedings before any advisory body to the local agency that were presented to the decisionmaking body before action on the fee or assessment.
   c) All notices issued by the local agency for purposes of complying with subdivision (c) of Section 53759.1, to comply with the requirements of Section 4 or 6 of Article XIII D of the California Constitution, or with any other law requiring notice.

   d) All timely submitted written objections and any local agency responses to those objections made pursuant to Section 53759.1.
   e) All written evidence or correspondence related to the fee or assessment submitted to, or transmitted from, the local agency prior to the completion of the protest hearing or ballot tabulation hearing required under Section 4 or 6 of Article XIII D of the California Constitution.
   f) Documentation of the local agency's final decision on the fee or assessment, including any ordinance, resolution, rule, regulation, meeting minutes, or other record of the local agency's decision.
   g) All protests, ballots, and records of the tabulation, protests, or ballots made in connection with the fee or assessment.
   h) All written evidence or documentation supporting the fee or assessment in the local agency's files prior to completion of the protest hearing or ballot tabulation hearing required under Section 4 or 6 of Article XIII D of the California Constitution.

7) Authorizes evidence outside the record of proceedings before the local agency to be admitted under the following circumstances:
   a) where the evidence is relevant to issues other than the validity of the fee or assessment, such as a petitioner's standing and capacity to sue;
   b) where the evidence is relevant to affirmative defenses, including, but not limited to, laches, estoppel, and res judicata;
   c) where the evidence is relevant to the accuracy and completeness of the administrative record certified by the local agency;
   d) where the evidence is relevant to the local agency's compliance with the exhaustion of remedies procedures;
   e) where the evidence is necessary to explain information in the administrative record to demonstrate compliance with Section 4 or subdivision (a) of Section 6 of Article XIII D of the California Constitution.

8) Makes various legislative findings and declarations including:
   a) The procedure created by this act is intended to provide a meaningful opportunity for a ratepayer to present an objection to a proposed new or amended property-related water or sewer fee or charge, or any special assessment, and allow the local agency the opportunity to resolve the objection, before resorting to litigation after the new or amended rate or special assessment is approved.
   b) Even if such an objection is not fully resolved, the local agency considering and responding to the objection can narrow the dispute and will create a better evidentiary record for court review in deciding any later litigation.
   c) This act is consistent with the intent of Proposition 218, which is to enhance communication between ratepayers and agencies.

COMMENTS

1. Stated need for the bill

The author writes:

> AB 2257 would authorize public agencies to adopt procedures for the submittal and consideration of public comments regarding proposed water or sewer rates or assessments. If an agency elects to adopt exhaustion procedures, a person would be required to timely submit written comments that specify the grounds for alleging that the fees do not comply with Proposition 218 in order to challenge the fees in court. AB 2257 would place new obligations on public agencies during the ratemaking process, by requiring agencies to provide written responses to all comments received before acting on the proposed fees. AB 2257 would also detail documents that would comprise the administrative record in the event of litigation.
>
> AB 2257 would build upon Proposition 218's existing procedural requirements by creating a clear and robust mechanism for customers to raise questions, concerns, comments, and criticisms of a proposed rate structure. The agency's governing body would have the benefit of hearing the evidence, which would include objections and the agency's responses, and apply its reasoned discretion and expertise. This is especially valuable in ratemaking cases in which evidence and policies are highly technical. The process would serve to foster better-informed administrative decisions, which benefit the objector, the public agency, and ratepayers that the agency serves. It would also help agencies develop more defensible rates and build rapport and trust with their ratepayers.

2. Proposition 218

Proposition 218, the Right to Vote on Taxes Act, was enacted by the voters in 1996 (gen. elec., (Nov. 5, 1996).) provides for, among other things, procedural and substantive requirements for the imposition of property-related fees. (Cal. Const. art. XIIID § 6(a), (b).) To impose a new fee, a local agency must identify parcels subject to the fee, calculate the amount, and provide notice by mail to affected property owners of the proposed fee. (*Id.* at § 6(a)(1).) The local agency must conduct a public hearing and consider all written protests filed by the affected property owners. (*Id*. at § 6(a)(2).) If a majority of the property owners present written protests against the fee, the fee may not be imposed. (*Id*.) These are generally understood to be procedural requirements. (*Planiter v. Ramona Municipal Water Dist.* (2019) 7 Cal5th 372, 381 [hereafter *Plantier*].)

The fees or assessments are also subject to various requirements related to the amount charged and the purposes for which the money may be used. (Cal. Const. art. XIIID § 6(b).) The courts have referred to these requirements as substantive limitations. (*Plantier* at 382.) Under these limitations, revenues derived from the fee may not exceed the cost

of providing the property-related service, those revenues may not be used for any purpose other than the one for which the fee was imposed, the amount of the fee cannot exceed the proportional cost of the service attributable to the property, and a fee may not be imposed for a service unless that service is available to the property owner. Cal. Const. art. XIIID § 6(b)(1)-(5).) Agencies have the burden to demonstrate the lawfulness of the fee or assessment, if challenged. (*Id*. at § 6(b)(5).) As a general matter, a fee must also receive voter approval; however, this requirement does not apply to sewer and water fees. (*Id.* at (c).)

The Proposition 218 Omnibus Implementation Act (Gov. Code § 53750 et seq.) further delineates the procedural requirements for notice and hearing applicable to changes in property-related fees and charges (Gov. Code § 53755). In 2021, SB 323 (Caballero, Ch. 216, Stats. 2021) enacted a 120-day limitations period for any judicial challenge to water and sewer fees and charges that were adopted, modified, or amended after January 1, 2022, and applied existing validation action procedures to these fees. SB 323 passed this Committee on a vote of 10 to 0.

The courts have held that the stated intent of Proposition 218 is that its provisions are to be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent. (*Hill RHF Housing Partner, L.P. v. City of Los Angeles* (2021) 12 Cal.5th 458 at 475 [hereafter *Hill*].) In regards to judicial review under the proposition, the courts have consistently held that courts should exercise their independent judgment in reviewing whether assessments that local agencies impose violate article XIII D instead of using a deferential standard of review. (*Ibid.*)

3. Exhaustion of administrative remedies

As a general proposition, the courts have held that a party is required to exhaust administrative remedies before pursing an action in the courts. (*Planiter* at 382-83.) An administrative remedy has been exhausted once all available and distinctive administrative review procedures have been concluded. (*Id*. at 383.) This rule is not a matter of judicial discretion but a fundamental rule of procedure grounded on policy concerns related to administrative autonomy and judicial efficiency. (*Ibid.)* The courts also point to the fact that requiring an administrative remedy to be pursued allows for a factual record to be created for the court's consideration. (*Ibid*.)

The California Supreme Court has held in two recent cases that the public hearing requirement under Proposition 218, as it applied to the petitioners in those cases, did not provide an adequate remedy to resolve the petitioners' challenges and, therefore, they were not required to make an objection at the public hearing in order to challenge a fee or assessment. In *Plantier* the petitioner objected to a sewer charge arguing that the assignment method of the charge violates Proposition 218's proportionality requirement. (*Id*. at 385.) In *Hill* petitioners were objecting to assessments on a business improvement district (BID) on the grounds that the assessment exceeds the reasonable

cost of the proportional special benefits conferred on petitioner's parcels and that the city erroneously declared a general benefit as a special benefit. (*Hill* at 475.)

An exhaustion of remedies requirement can be required by statute or inferred based upon the statutory and regulatory scheme involved. (*Hill* at 478.) In both *Plantier* and *Hill* the courts stated that Proposition 218 did not expressly require an exhaustion of remedies, and the court declined to infer one was required under the circumstances. In *Plantier*, the court concluded that "the Proposition 218 hearings held by the District were inadequate because they did not allow the District to resolve plaintiffs' particular dispute. Even if the District had considered the substance of plaintiffs' proportionality objection and concluded it had merit, the District would not have been able to address the matter in the context of the" public hearing to address a general rate increase. (*Plantier* at 387.) The court did note that if was not deciding or expressing a view "on the broader question of whether a Proposition 218 hearing could ever be considered an administrative remedy that must be exhausted before challenging the substantive propriety of a fee in court." (*Id*. at 388.)

Two years later, the court again addressed the issue of exhaustion of remedies under Proposition 218 in *Hill*. Unlike in *Plantier*, the court determined that had the petitioner in *Hill* participated in the public hearing it is plausible that the city could have resolved the objections to the assessment. (*Hill* at 481.) The court then analyzed the constitutional and statutory scheme of Proposition 218 and concluded that the public hearing was not structured for the submission, evaluation, and resolution of complaints. (*Id*. at 482.) In contrast, the court referred to prior cases where an exhaustion requirement was inferred and provided that the process in that case included "an evidentiary hearing, exchanges of information between the taxpayer and the government, examinations under oath, and the collection and introduction of evidence;" however, the court stated that it was not implying all of these procedures are required to have a valid administrative remedy, but merely illustrative of why the public hearing in *Hill* was an inadequate remedy. (*Id*. at 482-83.)

Additionally, the court in *Hill* looked to the purpose and aims of Proposition 218 and concluded that there were no "especially compelling policy justifications" for expanding the exhaustion doctrine to encompass the public comment remedy provided in the present circumstance. However, in a footnote the court commented that "[g]iven the other considerations behind our holding, we need not decide whether an exhaustion requirement of some kind could be reconciled with Proposition 218 under materially different circumstances." (*Hill* at 488, *see* fn. 8.)

4. <u>This bill seeks to establish an adequate process for the exhaustion of administrative remedies under Proposition 218</u>

This bill seeks to build upon dicta in the above cases and establish a statutory requirement to exhaust administrative remedies before bringing a challenge under

Proposition 218, and establish an administrative remedy that provides for submission, evaluation, and resolution of complaints. As the court has not definitively ruled out exhaustion of remedies under Proposition 218, enacting such a statutory requirement does not appear wholly impermissible. The bill provides that if a local agency elects to use the administrative remedy provided for in this bill, then a person or entity would be required to submit a written complaint before bringing a cause of action under Proposition 218 in the courts to challenge a fee or assessment. If they do not, they would be barred from bringing a legal challenge.

This bill seeks to be responsive to the courts explanation in *Plantier* and *Hill* regarding why the existing public comment requirement in those circumstances were inadequate—mainly a lack a mechanism for the submission, evaluation, and *resolution* of complaints. The procedures in this bill are not as robust to provide an evidentiary hearing, exchanges of information between the payer and the government, examinations under oath, and the collection and introduction of evidence. However, they seem to provide an ability for particularized complaints to be addressed and potentially resolved before needing to resort to litigation, which the court identified in *Plantier* as lacking and why the remedy in that case was inadequate.

In order for the exhaustion remedy under the bill to apply, a local agency must do all of the following:

- Make available to the public a proposed fee or assessment no less than 45 days prior to the deadline for a ratepayer to submit an objection.
- Posts on its internet website a written basis for the fee or assessment and mail the written basis to a property owner upon request.
- Provide a minimum of 45 days for a property owner to review the proposed fee or assessment and to timely submit to the local agency a written objection that specifies the grounds for alleging noncompliance.
- Consider and respond in writing, including the grounds for which a challenge is not resulting in amendments to the proposed fee or assessment, to any timely submitted written objections prior to the close of the protest hearing or ballot tabulation hearing required under Proposition 218.
- Requires timely submitted objections and agency responses to be presented to the local agency's governing body for consideration prior to or during a protest hearing or ballot tabulation.

The bill requires the written notice to include a statement that contains the following information:

- that all written objections must be submitted within the written objection period set by the local agency;
- that a failure to timely object in writing bars any right to challenge that fee or assessment through a legal proceeding; and

- explain all substantive and procedural requirements for submitting an objection to the proposed fee or assessment.

It is unclear how the exhaustion of remedies procedure under this bill is intended to interact with the public comment hearing required under Proposition 218. Would they be two separate procedures or would they be combined? There seems to be some incongruity between the requirements under the implementing statutes and the exhaustion of remedies procedure. For instance, Section 5375 of the Government Code requires that the notice of intent to levy a new or increased assessment must include, among other things, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated. Under the bill, the agency is only required to post this information on its website and mail it to the property owner of a parcel affected upon request. It is also unclear what would happen if a public hearing was delayed or the proposal modified. Would a new exhaustion of remedies procedure need to be instituted? Would the time period to submit a timely written objection still apply or would it be extended to coincide with the delay of the public hearing? Additionally, since failure to comply with the remedy would bar a legal challenge, it is necessary that this information is prominently displayed on any notice provided so the public is clearly informed of the ramifications of their action or inaction.

In light of the above, the author may wish to make the following amendments:

- Require the notice to prominently display the statement regarding the requirement of a written objection, including all substantive and procedural requirements, and that failure to submit a written objection will bar any right to challenge that fee or assessment through a legal proceeding.
- Require a link to written basis for the fee or assessment to be included in the notice.

These specific amendments are included in the mock-up at the end of the analysis.

As the bill moves through the legislative process, the author also may wish to consider clarifying how the exhaustion of remedy procedure and the existing public comment procedure are intended to interact, and what affect a delayed hearing or proposal modification would have on the exhaustion remedy under the bill.

5. <u>This bill would not provide an exhaustion of remedies procedure for all types of Proposition 218 cases</u>

A coalition of numerous water agencies, including the sponsor of the bill, write that there has been a rise in Proposition 218 litigation, which is making it increasingly difficult to ensure agencies can pass fair and reasonable rates to cover the costs of operations and investments and maintain stable budgets. They stress this is especially

harmful when these agencies are trying to address the unprecedented challenges presented by climate change. They write:

> Oftentimes, these suits are filed without first having raised these alleged violations with the public agency during the public notice-and-comment process leading up to the decision to adopt rates or assessment. When litigants avoid raising concerns with proposed rates or assessments during the ratemaking process, the public agencies cannot endeavor to resolve the dispute and avoid litigation. The financial consequences of these lawsuits can be severe, as it is not uncommon for litigants to seek tens of millions of dollars in damages. Surprise lawsuits have the potential to undermine an agency's ability to maintain stable budgets necessary to operate effectively.

However, it should be noted that this bill would not be able to completely address the concerns raised by the author and proponents, as highlighted by the *Plantier* case. In *Plantier*, the petitioner sought to challenge the existing allocation method used by the local agency, not the increase in the rate of the fee that was the subject of the public comment notice. The court explained that the purpose of the notice and hearing procedures in Proposition 218 is to provide property owners an opportunity to protest a "*proposed* fee or charge." (*Plantier* at 386-87 (emphasis in original); Cal. Const. art. XIII D § 6(a)(2).) In contrast, the substantive requirements apply to "*existing* as well as proposed fees." (*Id*. at 387 (emphasis in original).) The court rejected the argument of the water district that the method for allocating a fee is reenacted when the rate of the fee is increased. (*Ibid*.) The provisions of this bill would not address a situation similar to *Plantier* where an existing fee or assessment is challenged.

6. <u>This bill limits the judicial record for challenging a fee or assessment under Proposition 218</u>

The bill provides that, if a local agency complies with the exhaustion of remedies procedures when adopting a fee or assessment, then any judicial action or proceeding to review, invalidate, challenge, set aside, rescind, void, or annul the fee or assessment for failure to comply with the procedural and substantive requirements of Proposition 218 is limited to the record of proceedings before the local agency for that fee or assessment to the following:

- any cost-of-service or rate study or report, any engineer's report, agency staff reports, and related documents prepared by the local agency with respect to the fee or assessment;
- any transcript or minutes of the proceedings at which the decisionmaking body of the local agency heard testimony or public comment on the fee or assessment, and any transcript or minutes of the proceedings before any advisory body to the local agency that were presented to the decisionmaking body before action on the fee or assessment;

- all notices issued by the local agency for purposes of complying with this bill, Proposition 218, or with any other law requiring notice;
- all timely submitted written objections and any local agency responses;
- all written evidence or correspondence related to the fee or assessment submitted to, or transmitted from, the local agency prior to the completion of the protest hearing or ballot tabulation hearing ;
- documentation of the local agency's final decision on the fee or assessment, including any ordinance, resolution, rule, regulation, meeting minutes, or other record of the local agency's decision;
- all protests, ballots, and records of the tabulation, protests, or ballots made in connection with the fee or assessment; and
- all written evidence or documentation supporting the fee or assessment in the local agency's files prior to completion of the protest hearing or ballot tabulation.

The bill provides specified limited circumstances when evidence outside the record of proceedings before the local agency can be admitted to the following:

- where the evidence is relevant to issues other than the validity of the fee or assessment, such as a petitioner's standing and capacity to sue;
- where the evidence is relevant to affirmative defenses;
- where the evidence is relevant to the accuracy and completeness of the administrative record certified by the local agency;
- where the evidence is relevant to the local agency's compliance with the exhaustion of remedies procedures; and
- where the evidence is necessary to explain information in the administrative record to demonstrate compliance with Proposition 218.

As stated above, the courts have held that Proposition 218 places the burden on agencies to demonstrate the lawfulness of a challenged fee or assessment, and courts are to exercise their independent judgment when examining the evidence. (*Silicon Valley Taxpayers' Assn. v Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, at 450 [*hereafter Silicon Valley*].) This bill does not change that standard of review. It does; however, limit the evidence that can be reviewed by a court when making its decision. It is important to note that even in cases where the standard of review is a deferential one and limited to the administrative record, evidence outside the record can be admitted where the court finds that, in the exercise of reasonable diligence, the relevant evidence could not have been produced or that it was improperly excluded at the hearing before the respondent. (Code of Civ. Proc. § 1094.5(e).) This exact situation occurred in *Malott v. Summelrand Sanitary District*, where the appeals court stated that admitting evidence at the trial court via declaration that was outside the administrative record was permissible under Section 1094.5 of the Code of Civil Procedure in a

proposition 218 challenge. (*Malott v. Summelrand Sanitary District* (2020) 55 Cal.App.5th 1102, at 1110-11.)

The bill's provisions do not contain any similar language. In fact, it specifically allows evidence outside the record to be admitted to demonstrate compliance with the requirements of Proposition 218, but does not specify that evidence to demonstrate noncompliance can be admitted. The author may wish to amend the bill to specify that this authority to admit evidence outside the record is for evidence on the issue of compliance. Additionally, the author may wish to amend the definition of "fee or assessment" under these provisions to mirror the definition under the exhaustion of administrative remedies provision, described above. These specific amendments are included in the mock-up at the end of the analysis.

7. <u>It is unclear if bill's provisions are consistent with the purpose and intent of Proposition 218</u>

The court in *Silicon Valley* noted that Proposition 218 specifically states that its provisions are to be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent. (*Ibid.*) They explicated that the ballot materials explained to the voters the design of the proposition was to: constrain local governments' ability to impose assessments; place extensive requirements on local governments charging assessments; shift the burden of demonstrating assessments' legality to local government; make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent. (*Ibid.*)

In *Silicon Valley* the court declared that after the enactment of Proposition 218 the validity of an assessment, including the substantive requirements, is a constitutional question. (*Id.* at 449.) The court stated that the Legislature is limited in its power to regulate the exercise of a constitutional right and that legislation must further it purpose and not attempt 'to narrow or embarrass it' in any particular way.

As described above, the courts left open the question of whether an exhaustion or remedies provision would be appropriate as applied to Proposition 218. From this, it can be inferred that having a limited administrative record for any legal challenges is also an open question. It is unclear if this bill will be viewed by the court as narrowing the constitutional provisions of Proposition 218 in a way that frustrates its purpose as opposed to furthering it.

In light of the above, the author also may wish to amend the findings and declarations to comport with the cases above. The specific amendment is included in the mock-up at the end of the analysis.

8. Statements in support

The California Special Districts Association writes in support stating:

> Unfortunately, litigation commenced after the local agency has fulfilled its substantive and procedural obligations under the terms of Proposition 218 deprives local agencies of the opportunity to resolve disputes before adopting rate structures. Further complicating matters is the fact that litigation commenced after the Proposition 218 process has not been affirmatively limited to raising issues within the scope of the record of proceedings conducted by the local agency; a general rule of case law known as the "record-review rule" typically limits the scope of admissible evidence only to that evidence found within the record of proceedings before the legislative body of the local agency. This bill resolves these issues two ways: first, by creating an optional issue-exhaustion procedure, that, if a local agency elects to follow, would require litigants to raise specific Proposition 218 compliance issues during the Proposition 218 rate-setting process. Second, the bill would also codify the record[-]review rule and specified exceptions to apply to Proposition 218 litigation, preventing new evidence in court without an opportunity for a local agency to review and consider it during the ratemaking process. In these ways, AB 2257 ensures local agency boards are making fully-informed decisions and are not subject to surprise litigation that alleges issues not previously raised during the protest process.

9. Statements in opposition

A coalition of various business associations and taxpayer advocacy groups, including the Howard Jarvis Taxpayers Association and the California Business Roundtable, write in opposition, stating:

> The protest procedure set forth in this bill is separate from the notice required by Proposition 218 and merely layers on additional – and superfluous – requirements for the sole purpose of eliminating any meaningful ability of customers to evaluate and challenge property-related fees and assessments.
>
> It is also questionable what constitutes a "written basis" for proposed charges. Nothing in this bill requires that an engineer's report, rate study (or any other documentation that would allow a ratepayer to specify grounds upon which proposed rates might be invalid) to be available for review during the notice period, and current law does not require these materials to be available prior to adoption of new rates. How are they supposed to determine, even theoretically, what might be wrong with the proposed rates in the absence of a detailed analysis?
>
> The upshot is that this bill requires nothing more of the agency than mailing the notice that is already required under Prop. 218, stating the amount of the charge and

the basis of computation, and then forecloses litigation for any property owner or ratepayer who fails to raise specific objections during a time when the rate study and methodology are not even available for review. For example, if the rate study contains an indefensible arithmetic error, that fact would not be disclosed in the Prop. 218 notice, and yet the customer would be barred from legal recourse based on their inability to identify grounds for objection during the 45-day notice period.

Further, 45 days is an impossible time for: (1) a customer to schedule a consultation with an attorney; (2) the attorney to research whether there is a violation; (3) the attorney to find and retain an expert witness; (4) the expert to prepare a report; and (5) the attorney to draft and submit a thorough objection preserving all legal theories. Not to mention such cost a customer is expected to incur before knowing if the rates will even pass. It is wasteful (and further offensive) that the customer may not introduce expert testimony after the public hearing.

SUPPORT

Association of California Water Agencies (sponsor)
Alta Irrigation District
Amador Water Agency
Bella Vista Water District
Brooktrails Township Community Services District
California Alliance for Jobs
California Association of Sanitation Agencies
California Central Valley Flood Control Association
California Municipal Utilities Association
California Special Districts Association
California State Association of Counties
Calleguas Municipal Water District
Camrosa Water District
City of Camarillo
City of Carlsbad
City of Corona
City of Rancho Cucamonga
City of Sacramento City of Santa Rosa
City of Santa Rosa
Coastside County Water District
Contra Costa Water District
Crescenta Valley Water District
Crestline-lake Arrowhead Water Agency
Cucamonga Valley Water District
Diablo Water District
Dublin San Ramon Services District
East Bay Municipal Utility District

Eastern Municipal Water District
El Dorado Irrigation District
El Toro Water District
Environmental Defense Fund
Fallbrook Public Utilities District
Florin Resource Conservation District/elk Grove Water District
Georgetown Divide Public Utility District
Helix Water District
Hidden Valley Lake Community Services District
Irvine Ranch Water District
Las Virgenes Municipal Water District
Los Angeles County Sanitation Districts
Marin Municipal Water District
Mckinleyville Community Service District
Mcmullin Area Groundwater Sustainability Agency
Mendocino County Russian River Flood Control & Water Conservation
Metropolitan Water District of Southern California
Mid-peninsula Water District
Monte Vista Water District
Montecito Water District
Nevada Irrigation District
Olivenhain Municipal Water District
Padre Dam Municipal Water District
Pajaro Valley Water Management Agency
Palmdale Water District
Placer County Water Agency
Rosedale-rio Bravo Water Storage District
Rowland Water District
San Bernardino Valley Water Conservation District
San Juan Water District
Santa Clarita Valley Water Agency
Santa Fe Irrigation District
South San Joaquin Irrigation District
Stockton East Water District
Sweetwater Authority
Tahoe City Public Utility District
Three Valleys Municipal Water District
Town of Hillsborough
Tri-county Water Authority
Union Public Utilities District
Vallejo Flood and Wastewater District
Valley Center Municipal Water District
Walnut Valley Water District
Water Replenishment District of Southern California

Western Municipal Water District

OPPOSITION

California Business Roundtable
California Taxpayers Association
California Farm Workers and Families
California Taxpayer Protection Committee
Central Coast Taxpayers Association
Central Valley BizFed
Central Valley Taxpayers Association
Howard Jarvis Taxpayers Association
LA County Taxpayers Association
Monterey County Farm Bureau
Placer County Taxpayers Association
Solano County Taxpayers Association

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: SB 323 (Caballero, Ch. 216, Stats. 2021) enacted a 120-day limitations period for any judicial challenge to water and sewer fees and charges that were adopted, modified, or amended after January 1, 2022, and applied existing validation action procedures to these fees.

PRIOR VOTES

Assembly Floor (Ayes 52, Noes 12)
Assembly Local Government Committee (Ayes 7, Noes 2)
Assembly Judiciary Committee (Ayes 7, Noes 1)
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MOCK-UP OF AMENDMENTS FOR AB 2257 (WILSON, 2024)[1]

SECTION 1. The Legislature finds and declares all of the following:

(a) The purpose of this act is to create an exhaustion of administrative remedies procedure that, if a local agency chooses to implement it, requires ratepayers to bring an objection regarding a proposed property-related water or sewer fee or charge, or any special assessment to the local public agency governing body's attention prior to the deadline established by the local public agency as part of the rate or assessment consideration process. The purpose of the act is also to provide an opportunity for the local public agency to address or resolve the objection or objections before its governing body makes a final decision on whether to establish a new, or amend a current, property-related fee or special assessment pursuant to Proposition 218.

(b) The procedure created by this act is intended to provide a meaningful opportunity for a ratepayer to present an objection to a proposed new or amended property-related water or sewer fee or charge, or any special assessment, and allow the local agency the opportunity to resolve the objection, before resorting to litigation after the new or amended rate or special assessment is approved (see Plantier v. Ramona Municipal Water Dist. (2019) 7 Cal.5th 372, 383). Even if such an objection is not fully resolved, the local agency considering and responding to the objection can narrow the dispute and will create a better evidentiary record for court review in deciding any later litigation (see id.).

(c) This act establishes a "clearly defined machinery for the submission, evaluation, and resolution of complaints by aggrieved parties" (see Plantier v. Ramona Municipal Water Dist., supra, 7 Cal.5th at p. 384, citing Rosenfield v. Malcom (1967) 65 Cal.2d 559, ~~566) and is consistent with the intent of Proposition 218, which is to enhance communication between ratepayers and agencies (Morgan v. Imperial Irrigation Dist. (2014) 223 Cal.App.4th 892, 911; see also Bighorn-Desert View Water Agency v. Virjil (2006) 39 Cal.4th 205, 220).~~ *556).*

SEC. 2. Section 53759.1 is added to the Government Code, to read:

53759.1. (a) For purposes of this section, the following definitions apply:

(1) "Exhaustion of remedies requirement" means the written objection requirement under subdivision (b).

[1] The amendments may also include technical, nonsubstantive changes recommended by the Office of Legislative Counsel.

(2) "Fee or assessment" means the amount of any property-related water or sewer fee or charge, or any special assessment levied or the methodology used to develop and levy the fee, charge, or assessment.

(3) "Sewer" includes systems, all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate sewage collection, treatment, or disposition for sanitary or drainage purposes, including lateral and connecting sewers, interceptors, trunk and outfall lines, sanitary sewage treatment or disposal plants or works, drains, conduits, outlets for surface or storm waters, and any and all other works, property, or structures necessary or convenient for the collection or disposal of sewage, industrial waste, or surface or storm waters. "Sewer system" shall not include a sewer system that merely collects sewage on the property of a single owner.

(4) "Water" means any system of public improvements intended to provide for the production, storage, supply, treatment, or distribution of water from any source.

(b) For purposes of any fee or assessment adopted by a local agency pursuant to Section 4 or 6 of Article XIII D of the California Constitution, if the local agency complies with the procedures described in subdivision (c), a person or entity shall be prohibited from bringing a judicial action or proceeding alleging noncompliance with Article XIII D of the California Constitution for any new, increased, or extended fee or assessment, unless that person or entity has timely submitted to the local agency a written objection to that fee or assessment that specifies the grounds for alleging noncompliance.

(c) The exhaustion of remedies requirement authorized by subdivision (b) applies only if the local agency does all of the following:

(1) Makes available to the public a proposed fee or assessment no less than 45 days prior to the deadline for a ratepayer to submit an objection, as established by the local agency pursuant to paragraph (4).

(2) Posts on its internet website a written basis for the fee or ~~assessment.~~ *assessment and include a link to the internet website in the in the written notice, sent pursuant to paragraph (c) of Section 4 or paragraph (1) of subdivision (a) of Section 6 of Article XIII D of the California Constitution.*

(3) Mails the written basis described in paragraph (2) to a property owner upon request.

(4) Provides at least 45 days for a property owner to review the proposed fee or assessment and to timely submit to the local agency a written objection to that fee or assessment that specifies the grounds for alleging noncompliance. To be considered timely, any written objection shall be submitted by a deadline established by the local agency, which shall be no less than 45 days after notice is provided pursuant to

subdivision (c) of Section 4 or paragraph (1) of subdivision (a) of Section 6 of Article XIII D of the California Constitution, as applicable.

(5) Considers and responds in writing, including the grounds for which a challenge is not resulting in amendments to the proposed fee or assessment, to any timely submitted written objections prior to the close of the protest hearing or ballot tabulation hearing required under Section 4 or 6 of Article XIII D of the California Constitution. The agency's response shall explain the substantive basis for retaining or altering the proposed fee or assessment in response to the written objection. Timely submitted written objections and agency responses required by this subdivision shall be presented to the local agency's governing body for consideration prior to or during a protest hearing or ballot tabulation hearing required under Section 4 or 6 of Article XIII D of the California Constitution.

(6) Includes in the written notice, sent pursuant to paragraph (c) of Section 4 or paragraph (1) of subdivision (a) of Section 6 of Article XIII D of the California Constitution, a *prominently displayed* statement that contains the following information:

(A) That all written objections must be submitted within the written objection period set by the local agency pursuant to paragraph (4) and that a failure to timely object in writing bars any right to challenge that fee or assessment through a legal proceeding.

(B) All substantive and procedural requirements for submitting an objection to the proposed fee or assessment.

(7) Completes the procedures described in paragraphs (1) to (6), inclusive, prior to the completion of the protest hearing and ballot tabulating hearing required by Section 4 or 6 of Article XIII D of the California Constitution.

(d) The local agency's governing body, in exercising its legislative discretion, shall determine whether the written objections and the agency's response warrant clarifications to the proposed fee or assessment, a reduction in the proposed fee or assessment, further review before making a determination on whether clarification or reduction is needed, or whether to proceed with the protest hearing or ballot tabulation hearing required under Section 4 or 6 of Article XIII D of the California Constitution.

(e) The local agency's response to timely submitted written objections, as required under paragraph (5) of subdivision (c), shall go to the weight of the evidence supporting the agency's compliance with the substantive limitations on fees and assessments imposed by Section 4 or 6 of Article XIII D of the California Constitution. There shall be no independent cause of action as to the adequacy of a local agency's response pursuant to paragraph (5) of subdivision (c).

SEC. 3. Section 53759.2 is added to the Government Code, to read:

53759.2. (a) For purposes of this section, "fee or assessment" means any property-related water or sewer fee or charge, or any *special assessment levied or the methodology used to develop and levy the fee, charge, or* assessment.

(b) Notwithstanding any law, if a local agency adopts a fee or assessment and complies with subdivision (c) of Section 53759.1, any judicial action or proceeding to review, invalidate, challenge, set aside, rescind, void, or annul the fee or assessment for failure to comply with the procedural and substantive requirements of Section 4 or 6 of Article XIII D of the California Constitution in the fee or assessment setting process shall be subject to the following requirements:

(1) Except as provided in paragraph (2), the court's review shall be limited to the record of proceedings before the local agency for that fee or assessment as follows:

(A) Any cost-of-service or rate study or report, any engineer's report, agency staff reports, and related documents prepared by the local agency with respect to the fee or assessment.

(B) Any transcript or minutes of the proceedings at which the decisionmaking body of the local agency heard testimony or public comment on the fee or assessment, and any transcript or minutes of the proceedings before any advisory body to the local agency that were presented to the decisionmaking body before action on the fee or assessment.

(C) All notices issued by the local agency for purposes of complying with subdivision (c) of Section 53759.1, to comply with the requirements of Section 4 or 6 of Article XIII D of the California Constitution, or with any other law requiring notice.

(D) All timely submitted written objections and any local agency responses to those objections made pursuant to Section 53759.1.

(E) All written evidence or correspondence related to the fee or assessment submitted to, or transmitted from, the local agency prior to the completion of the protest hearing or ballot tabulation hearing required under Section 4 or 6 of Article XIII D of the California Constitution.

(F) Documentation of the local agency's final decision on the fee or assessment, including any ordinance, resolution, rule, regulation, meeting minutes, or other record of the local agency's decision.

(G) All protests, ballots, and records of the tabulation, protests, or ballots made in connection with the fee or assessment.

(H) All written evidence or documentation supporting the fee or assessment in the local agency's files prior to completion of the protest hearing or ballot tabulation hearing required under Section 4 or 6 of Article XIII D of the California Constitution.

(2) Evidence outside the record of proceedings before the local agency may be admitted under the following circumstances:

(A) Where the evidence is relevant to issues other than the validity of the fee or assessment, such as a petitioner's standing and capacity to sue.

(B) Where the evidence is relevant to affirmative defenses, including, but not limited to, laches, estoppel, and res judicata.

(C) Where the evidence is relevant to the accuracy and completeness of the administrative record certified by the local agency.

(D) Where the evidence is relevant to the local agency's compliance with the procedures set forth in subdivision (c) of Section 53759.1.

(E) Where the evidence is necessary to explain information in the administrative record ~~to demonstrate~~ *on the issue of* compliance with Section 4 or subdivision (a) of Section 6 of Article XIII D of the California Constitution.

(c) Nothing in this section shall preclude any civil action related to a local agency's failure to implement a fee or assessment in compliance with the manner adopted by the local agency.